A **LAGUNA DE BAY SDN BHD**

v.

MAJLIS PERBANDARAN SUBANG JAYA

B HIGH COURT MALAYA, SHAH ALAM
VERNON ONG J
[JUDICIAL REVIEW NO: 25-98-05-2012]
16 MAY 2013

C ***ADMINISTRATIVE LAW:*** *Local authority - Revenue - Local Government Act 1976 - Provisions of - Whether imposition of 25% rental rate permitted source of revenue under Local Government Act 1976 and by-laws governing local authorities - Whether contravened s. 68 of the National Land Code*

D ***ADMINISTRATIVE LAW:*** *Exercise of administrative powers - Local authority - Ultra vires - Whether local authority had properly exercised discretionary powers - Whether sub-licence agreement valid pursuant to s. 68 of National Land Code*

E The applicant was in the business of outdoor advertising since 2005. Its business include the construction and erection of outdoor billboards, which would be subsequently let out to its clients for the purpose of displaying advertisements. The respondent is the local authority for Subang Jaya. On 26 August F 2008, the Selangor State Secretary had issued a policy and guidelines circular relating to the construction of billboards for local authorities of Selangor. An amendment to the circular was issued on 31 March 2009. Both the circular and the amended circular required several actions including the need to increase income for G the local authorities; instead of the former practice requiring the applicant or advertiser to make an application to the Land Administrator for the Temporary Occupation License ('TOL'), all applications for TOL had to be made by the local authority; the local authority to negotiate with the applicant to rent the land H from the local authority failing which the local authority would issue a notice of eviction and demolish the billboard structure and offer the site to another billboard operator; and the rental rate for the site to be imposed by the local authority to be between 30% and 25% of the revenue earned by the applicant on the particular I billboard. In 2011, the respondent prepared a rental agreement described as 'Billboard Site(s) Sub-Licence Agreement' incorporating the terms of the circular and the amended circular. Thus, the

applicant filed the present application against the respondent's decision by contending that the respondent in imposing the sub-licence agreement had acted *ultra vires* its powers; imposed an agreement that was illegal and/or in contravention of the law; and acted unreasonably, grossly disproportionately and was motivated by factors which were irrelevant.

Held (allowing application with costs):

(1) The respondent had justified that its imposition of the 25% rental charge under the sub-licence agreement was in compliance with the Circular. Upon perusal of the relevant provisions of the Local Government Act 1976 ('LGA'), there was nothing to support the contention that it was a permitted source of revenue under LGA; neither was it provided under any by-laws. (para 47)

(2) The terms of the sub-licence agreement purports to give the respondent broad overreaching powers. The powers, especially those contained in cls. 8 (change of shareholding), 4.3 (undertaking to provide audited accounts) and 6.1(a) (undertaking to pay taxes) were not within the terms of its powers under the LGA or by-laws. Neither could it be said that such powers were within the bounds of the statutory purpose or within the contemplation of its statutory powers. (para 48)

(3) The right being licensed out by the respondent to the applicant was the right to occupy the billboard site - the land over which the license under the TOL was issued. The sub-licence agreement was in fact an arrangement to circumvent s. 68 of the National Land Code which prohibits the assignment or transfer of the TOL to any third party. The respondent had *ultra vires* its powers when it sought to impose the sub-licence agreement on the applicant. Further, for being in express contravention of s. 68 NLC, the purported assignment of the TOL under sub-licence agreement was illegal, null and void. (paras 53 & 54)

(4) The respondent had improperly exercised its discretionary powers. Previously, the fees charges for the billboards were about RM33,000. However, the new fees sought to be imposed came close to a quarter million. The terms in the sub-licence agreement relating to the control of the applicant's

shareholding, delivery of audited accounts and undertaking to pay taxes were rather arbitrary and not within the scope or contemplation of the respondent's powers under LGA and by-laws. What the respondent sought to do under the sub-licence agreement was an entirely different and distinct scheme altogether; it was sought in one breath to disenfranchise the applicant as TOL holder to its right to apply for a renewal of its TOL. Instead, the local authority would be issued the TOL. The respondent would then sub-licence the TOL to the applicant and charge 25% fee on the gross revenue. This scheme did not appear to be contemplated within the LGA or by-laws. It was also illegal for being in contravention of s. 68 of the NLC. (para 55)

Case(s) referred to:

Ang Too Chew & Sons (Malaysia) Sdn Bhd v. Wakil-wakil Diri Bagi Mohamed Taib Yusoff, Simati [1997] 2 CLJ 687 HC ***(refd)***

Anisminic Limited v. The Foreign Compensation Commission & Anor [1969] 1 All ER 208 ***(refd)***

Associated Provincial Picture Houses Limited v. Wednesbury Corp [1948] 1 KB 223 ***(refd)***

B Surinder Singh Kanda v. The Government of the Federation of Malaya [1962] 1 LNS 14 PC ***(refd)***

Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeal [1997] 1 CLJ 665 CA ***(refd)***

Kumpulan Perangsang Selangor Bhd v. Zaid Mohd Noh [1997] 2 CLJ 11 SC ***(refd)***

Marble Terrazo Industries Sdn Bhd v. Anggaran Enterprise Sdn Bhd & Yang Lain [1991] 1 CLJ 109; [1991] 1 CLJ (Rep) 691 HC ***(refd)***

Menara PanGlobal Sdn Bhd v. Arokianathan Sivapiragasam [2006] 2 CLJ 501 CA ***(refd)***

Michael Lee Fook Wah v. Menteri Sumber Tenaga Manusia, Malaysia & Anor [1998] 1 CLJ 227 CA ***(refd)***

Minister of Labour & The Government of Malaysia v. Lie Seng Fatt [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195 SC ***(refd)***

Muhammad Hilman Idham & Ors v. Kerajaan Malaysia & Ors [2011] 9 CLJ 50 CA ***(refd)***

Murugesan v. Krishnasamy & Anor [1957] 1 LNS 44 HC ***(refd)***

Paruvathy d/o Murugiah v. Krishnan s/o Doraisamy [1983] 1 LNS 19 FC ***(refd)***

Penang Dvpt Corp v. Teoh Eng Huat & Anor [1992] 1 CLJ 476; [1992] 3 CLJ (Rep) 204 HC ***(refd)***

Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1978] 1 LNS 143 FC ***(refd)***

Petroliam Nasional Bhd v. Nik Ramli Nik Hassan [2003] 4 CLJ 625 FC ***(refd)***
Quah Swee Khoon v. Sime Darby Bhd [2001] 1 CLJ 9 CA ***(refd)***
R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***
Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629 FC ***(refd)***
Rohana Ariffin v. Universiti Sains Malaysia & Another Case [1988] 1 CLJ 559; [1988] 2 CLJ Rep 390 HC ***(refd)***
Sugumar Balakrishnan v. Pengarah Imigresen Negeri Sabah & Anor & Another Appeal [1998] 3 CLJ 85 CA ***(refd)***
Tan Tek Seng @ Tan Chee Meng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771 CA ***(refd)***
United Overseas Bank (Malaysia) Bhd v. Mok Hue Huan & Anor [2010] 9 CLJ 764 HC ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 24
Courts of Judicature Act 1964, s. 25(2)
Local Government Act 1976, ss. 9, 13, 36, 39, 101(s)
National Land Code, ss. 65, 68
Rules of Court 2012, O. 53 r. 2(2)
Specific Relief Act 1950, s. 44

For the appellant - P Lathika; M/s Lathika & Assocs
For the respondent - Preetha Pilai; M/s Skrine

Reported by Thirunavakarasu Vijayan

JUDGMENT

Vernon Ong J:

[1] On 11 March 2013, the court allowed the application for judicial review of the decision of the respondent to impose rent of 25% of the gross revenue charged by the applicant to its clients for the site rental fee. The grounds of the decision follows.

Brief Account Of The Facts

[2] The applicant is in the business of outdoor advertising since 2005. It's business include the construction and erection of outdoor billboards which are subsequently let out to its clients for the purpose of displaying advertisements. The respondent is the local authority for Subang Jaya.

[3] In 2007, the applicant obtained the necessary Temporary Occupation Licence ('TOL') from the Land Administrator in respect of the land upon which the bill has been erected; the TOL was renewed for 2007 and 2008. The requisite planning permission to erect the billboard has also been obtained. The applicant has also obtained the Structural Permits and Advertising Licence for 2007 and 2008.

[4] In 2008, a policy and guidelines circular dated 26 August 2008 was issued by the Selangor State Secretary relating to the construction of billboards for local authorities in the State of Selangor. An amendment to the circular was issued on 31 March 2009. The salient points of the circular and amended circular (jointly referred to as 'the circular') may be summarised as follows:

(a) the need to increase income for the local authorities;

(b) instead of the former practice requiring the applicant or advertiser to make an application to the Land Administrator for the TOL, all applications for TOL had to be made by the local authority;

(c) the local authority to negotiate with the applicant to rent the land from the local authority and if the applicant refuses to do so, the local authority is to issue a notice of eviction and demolish the structure and offer the site to another billboard operator; and

(d) the rental rate for the site to be imposed by the local authority is to be between 30% and 25% of the revenue earned by the applicant on the particular billboard.

[5] In 2008, the applicant applied to renew the TOL for the year 2009 from the District Land Administrator. On 6 November 2009, the respondent wrote to the applicant informing *inter alia*, that the licences thus far required annually was still to be obtained by the applicant, namely that over and above the RM32,500 that was payable yearly for the TOL and licences under the existing bye laws, the applicant was required to pay an additional amount of RM254,000 as "bayaran Perkongsian Tapak".

[6] On 16 November 2009, the respondent wrote to the applicant informing that the amount payable had been reduced to RM189,000, which said sum was inclusive of the TOL and the structural permit and advertising licences. On 4 December 2009,

the respondent reduced the amount to RM63,000. By a letter dated 31 December 2009, the amount payable was further reduced to RM33,000. The applicant agreed to this amount.

[7] On 9 August 2010, the respondent wrote to the applicant with an offer for the tenancy of the site ('offer letter'). Under the offer letter, the rental to be imposed was the higher of either (i) 25% of the applicant's gross annual income together with the TOL fee of RM3,000 or a minimum charge of RM33,000. On 19 August 2010, the applicant wrote to the respondent accepting the offer attaching payment of RM33,000 for year 2010.

[8] In 2011, by a letter dated 31 January 2011 the respondent reiterated that the applicant was liable to pay aforesaid rental for the site. By a letter dated 14 February 2011, the applicant said that they were prepared to pay whatever is prescribed by law and enclosed a cheque for RM33,000 for year 2011.

[9] On 26 August 2011, the respondent wrote to the applicant asking the applicant to appear at the respondent's office to sign a rental agreement; the applicant was required to pay RM5,884.33 towards legal costs for the preparation of the agreement. In response to the applicant's request, a copy of the draft rental agreement was forwarded to the applicant on 6 September 2011. The rental agreement in question was described as•"BILLBOARD SITE(S) SUB-LICENCE AGREEMENT".

[10] After receiving the draft agreement, the applicant tried to communicate with the respondent to clarify the terms but to no avail.

[11] By a letter dated 1 December 2011, the respondent informed the applicant that they will withdraw its offer for the site if the applicant fail to sign the rental agreement. On 26 April 2012, the respondent wrote to the applicant informing that they were withdrawing their offer with immediate effect and requiring the applicant to remove the structure and billboards within 30 days, failing which the respondent will take over the site or demolish the structure and billboards. The respondent's decision was made because of (i) the applicant's failure to sign the rental agreement, and (ii) the applicant's failure to obtain planning permission, structural permit, advertising licence.

Judicial Review In Malaysia

[12] Judicial review is a branch of law dealing with administrative law. In its traditional sense, it refers to the exercise of the court's supervisory powers over the decisions of inferior tribunals and statutory bodies. The decisions are tested against established principles developed over time by the common law (see recent decision of the Court of Appeal in *Muhammad Hilman Idham & Ors v. Kerajaan Malaysia & Ors* [2011] 9 CLJ 50; [2011] 6 MLJ 507).

[13] The powers of the High Court of judicial review is enshrined under the Specific Relief Act 1950 and the Courts of Judicature Act 1964 ('CJA 1964'); in particular the additional powers which are set out in para. 1 of the Schedule to s. 25(2) CJA 1964. It empowers the High Court to issue to any person of authority directions, orders or writs, including writs of the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any others, for the enforcement of the rights conferred by Part II of the Constitution. In fact, an application for judicial review may include a prayer for a declaration (O. 53 r. 2(2) ROC 2012). In the context of an application for judicial review of a decision of an inferior tribunal or statutory body, the court is usually called upon to make an order for *mandamus*, prohibition or *certiorari*. An order of *certiorari* has the effect of quashing a decision of a judicial or quasi-judicial authority with the intention of restraining any *ultra vires* exercise of powers. An order of *mandamus* is directed to private or municipal corporations, or to any of its officers, commanding the performance of a particular actor duty mandated by law (see s. 44 of the Specific Relief Act 1950). An order of prohibition is directed only against a judicial or quasi-judicial authority in respect of proceedings before them.

Distinction Between Public Law Proceedings And Private Law Proceedings

[14] Underlying the distinct nature of an application for judicial review is the requirement in Malaysian common law to have regard to the interest of good administration. In order to appreciate this concept, it is essential to draw a distinction between public law proceedings and private law proceedings.

[15] In private law proceedings, it is the parties alone who are directly concerned with the outcome of the litigation. The public at large are not usually interested in the outcome. Be that as it may, the public as a whole are concerned only that private law

proceedings should provide a fair and efficient manner of resolving disputes between individuals and of enforcing the rights of one individual over another.

[16] In contrast, public law proceedings usually affect many members of the public or even the public at large as well as the parties to the proceedings (eg, decisions of public bodies concerning Orang Asli native land rights, environment issues, planning permission, public nuisance, etc). Other members of the public will be interested to a lesser extent, whether financial or otherwise. However, there are also public law proceedings which do not usually affect the members of the public. A common example of this involves a person's application to quash the decision of the Industrial Court dismissing his claim for reinstatement on the ground of unlawful dismissal. In these cases, the court will be largely, if not exclusively, concerned with the merits of the application alone. Both sets of proceedings are treated as public law proceedings because the decision is taken by a public body performing a public duty. Typically, the public bodies *qua* respondents in an application for JR would be the Ministry of Human Resource, Minister of Home Affairs, Registrar of Societies, State Executive Council, Registrar of Land and Mines, BURSA Malaysia, Securities Commission, government departments (such as Immigration, Royal Customs, Royal Malaysian Police), tribunals (such as Housing Tribunal, Consumer Claims Tribunal), statutory bodies (Malaysian Medical Council, Lembaga Akitek Malaysia), Service Commissions, Director General of Inland Revenue and Majlis Agama Islam, to name a few.

[17] As a general rule, the court has to take into account not only the interests of the applicant and the respondent but also the interests of the public as a whole in good administration.

[18] Judicial review is therefore primarily concerned with enforcing public duties on behalf of the public as a whole. In this sense, the court's concern with vindicating the interests of the individual is part of the process of ensuring that public bodies do not act unlawfully and that they do perform their public duties.

Principles Of Judicial Review

[19] At the outset it should also be noted that the remedy of judicial review is not concerned with reviewing the merits of the decision in which the application for judicial review is made.

Instead, the remedy of judicial review is primarily a review of the decision making process. In performing this role the court is sitting in its supervisory jurisdiction and not in its appellate jurisdiction. (*Michael Lee Fook Wah v. Menteri Sumber Tenaga Manusia, Malaysia & Anor* [1998] 1 CLJ 227; [1998] 1 MLJ 305) The court will not interfere with the exercise of any power or discretion which has been conferred on an inferior court, administrative tribunal or other public authority. However, the decision of the body may be quashed by an order of *certiorari* where (i) that body has acted without jurisdiction; or (ii) that body has exceeded its jurisdiction; or (iii) body has failed to comply with the rules of natural justice in a case where the rules are applicable; or (iv) there is an error of law on the face of the record or the decision is unreasonable in the Wednesbury sense. In short, whether *certiorari* will lie to quash the decision which has already been made by that body depends not on the decision itself but on whether the decision was made *ultra vires*, unfairly or unjustly in the exercise of the discretion. In dealing with this application for judicial review there are fundamental principles to be applied within regard the principles enunciated by the Court Of Appeal in a case involving a judicial review of an award of the Industrial Court a reinstructive. In *Menara PanGlobal Sdn Bhd v. Arokianathan Sivapiragasam* [2006] 2 CLJ 501 at p. 526; [2006] 3 MLJ 493 at p. 511 Mohd Ghazali JCA (later FCJ) said:

> From the authorities discussed above, I would think that **in dealing with judicial review a judge should have the following principles, inter alia, in the forefront of his mind**:
>
> (i) **judicial review is not an appeal from a decision but a review of the matter in which the decision was made;**
>
> (ii) **the High Court is not entitled on an application for judicial review to consider whether the decision itself, on the merits of the facts, was fair and reasonable**;
>
> (iii) **the High Court through judicial review, should not introduce technicalities of the court of law** to the Industrial Court; this would certainly be so as s. 30(5) of the Act imposes a duty upon the Industrial Court to have regard to substantial merits of the case rather than to technicalities and it also requires the Industrial Court to decide a case in accordance with equity and good conscience;

(iv) the main and only function of the Industrial Court in dealing with a reference under s. 20 of the Act is to determine whether the misconduct or irregularities complained of by the management as to the grounds of dismissal were in fact committed by the workman and if so, whether such grounds constitute just cause or excuse for the dismissal.

(v) **the Industrial Court should not be burdened with the technicalities regarding standard of proof, the rules of evidence and procedure that are applied in the court of law**;

(vi) *the High Court will not interfere with findings of fact by the Industrial Court unless the same are completely unsupported by evidence and further, will not interfere merely because it may come to different conclusions on facts on the basis of the same evidence; weighing and assessing the evidence of the witnesses is the function of the Industrial Court and not that of the High Court*.

(emphasis added)

[20] Against the backdrop of the Court of Appeal's decision in *Menara PanGlobal Sdn Bhd v. Arokianathan Sivapiragasam*, *supra*, in *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629; [2010] 6 MLJ 1 the Federal Court held that the distinction between review and appeal no longer holds. The principles to which a reviewing court should scrutinise included the following matters:

(i) the decision making process where the impugned decision is flawed on the ground of procedural impropriety;

(ii) the merits where the decision is grounded on illegality or plain irrationality;

(iii) the findings where the facts do not support the conclusion arrived at by a tribunal; or

(iv) the findings where the findings of the tribunal had been arrived at by taking into consideration irrelevant matters, and had failed to take relevant matters into consideration.

[21] Be that as it may, the power to review a decision on its merits is not absolute. In cases involving public policy, national interest, public safety or national security, it may be inappropriate to go in to the merits or otherwise of a decision during a judicial review application (*Kumpulan Perangsang Selangor Bhd v. Zaid Mohd Noh* [1997] 2 CLJ 11; [1997] 1 MLJ 789; *Petroliam Nasional Bhd v. Nik Ramli Nik Hassan* [2003] 4 CLJ 625; [2004] 2 MLJ 288).

[22] In the light of the above cited authorities, it is settled law that there are three principal grounds upon which a court may review a decision of an inferior tribunal or statutory body. They are:

(a) Procedural Impropriety;

(b) Illegality; and

(c) Irrationality.

Procedural Impropriety

[23] This is a classic case of review of the decision-making process. It addresses the decision-making process to test for procedural fairness with reference to the context and applicable statutory provisions. It includes the right to be heard, the rule against bias and the requirement of prior notice of the decision so that the person affected by the decision will be in a position to make representations and to adequately prepare and answer the case against him. There is also a duty of adequate disclosure. Whilst there must be a fair hearing, there is no general right of oral hearing. There is no general right to call witnesses or to cross-examine witnesses. There is also no general right to legal representation. Whilst there is also no general duty to give reasons, such failure to give reasons may give rise to the inference that there are no valid reasons for the decision. Further, there must be a real hearing. The decision maker cannot fetter its discretion by self-created rules of policy. The decision maker must be impartial and free from bias; the test for bias being absence of direct pecuniary interest (*B Surinder Singh Kanda v. The Government of the Federation of Malaya* [1962] 1 LNS 14; [1962] MLJ 169; *Sugumar Balakrishnan v. Pengarah Imigresen Negeri Sabah & Anor & Another Appeal* [1998] 3 CLJ 85; *Rohana Ariffin v. Universiti Sains Malaysia & Another Case* [1988] 1 CLJ 559; [1988] 2 CLJ Rep 390).

Illegality

[24] This involves a review of the decision-making process, not the merits. This is a typical ground for the control of discretionary power. Classic examples of illegality include 'error of law' and 'excess of jurisdiction', abuse of power and Anisminic error. Under this head, the court will consider whether the public body in question had acted within the terms of power granted to it and

within the bounds of the statutory purpose (*R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145; *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629). Decisions tainted with illegality may arise if a decision maker makes a decision for an extraneous purpose or improper motive or takes into consideration irrelevant factors and/or fails to take into consideration relevant factors. The court must also be satisfied that the decision is not actuated by *mala fide*. The decision making process must also not violate the rule against delegation of discretionary power or the rule against deciding on no evidence or making findings of fact with no rational evidential basis; though as a rule there is non-interference with the assessment of evidence, particularly testimonial evidence (*Minister of Labour & The Government of Malaysia v. Lie Seng Fatt* [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195; [1990] 2 MLJ 9; *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeal* [1997] 1 CLJ 665; [1996] 1 MLJ 481; *Quah Swee Khoon v. Sime Darby Bhd* [2001] 1 CLJ 9; [2000] 2 MLJ 600; [2000] 2 AMR 2265).

[25] Lack of jurisdiction may arise in circumstances where a tribunal ask itself the wrong question; or take into account matters which it was not directed or required to take into account; or may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. (*Anisminic Limited v. The Foreign Compensation Commission* [1969] 1 All ER 208, 213-214) .

Irrationality

[26] Under this ground, the issue is not whether the decision-maker strayed outside the purposes defined by the governing statute (the 'illegality' test), nor whether the decision was procedurally unfair (the 'procedural propriety' test). The question to be determined is whether the power under which the decision-maker acts, a power which normally confers a broad discretion has been improperly exercised. Therefore, a review under this ground extends beyond the process and to the substance or merits of the decision.

[27] A decision which falls on this ground is said to have failed the 'Wednesbury unreasonableness' test (see *Associated Provincial Picture Houses Limited v. Wednesbury Corp* [1948] 1 KB 223). This is a decision that is said to be so outrageous in its defiance of

logic that no sensible person who had applied his mind to it could have arrived at it. It also involves a consideration of the principle of 'proportionality' *Tan Tek Seng @ Tan Chee Meng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771; [1996] 1 MLJ 261; *Kumpulan Perangsang Selangor Bhd v. Zaid Mohd Noh* [1997] 2 CLJ 11). It may also include decisions taken in bad faith, oppressively or based on considerations which have been accorded manifestly inappropriate weight, in addition to strictly irrational decisions which are illogical or arbitrary (*R Rama Chandran*, *supra*).

[28] This principle was adopted by the Federal Court in *Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135. In that case the registered owner of a piece of freehold land (title in perpetuity) applied to the Federal Government for sub-division of the land and for conversion of the express condition relating to the use of a hotel for which planning permission had been granted. The registered owner was informed that the application would be approved on condition that after surrendering the land, the registered owner would receive back a lease of 99 years instead of title to the land in perpetuity. The registered owner applied to court for an order that the approving authority approve its application for subdivision upon the usual terms and conditions. The High Court gave judgment for the registered owner. On appeal the Federal Court held that the approving authority had no power to make the registered owner/applicant give up its freehold title and receive in exchange a 99 year lease. The condition was set aside. The condition in question which the registered owner objected to did not relate to the permitted development, it was unreasonable and was used for an ulterior object, the object being to bring developed land into line with newly alienated land as to which only leases not titles in perpetuity are granted. At p. 146 (MLJ) Suffian LP reiterated the following principles:

> I am of the opinion that English cases afford principles that may be followed here. What are the principles? They are:
>
> 1. The approving authority does not have an uncontrolled discretion to impose whatever condition it likes.
>
> 2. The conditions, to be valid, must fairly and reasonably relate to the permitted development.
>
> 3. The approving authority must act reasonably and planning conditions must be reasonable.

4. The approving authority is not at liberty to use its power for an ulterior object, however, desirable that object may seem to it in the public interest.

...

In reconsidering these applications, the Committee should act fairly and not arbitrarily. There must be no bad faith and no dishonesty, though in fairness to everybody concerned nobody has suggested that on the part of the Committee. There must be no unreasonableness, no attention to extraneous circumstances, no disregard to public policy, and things of that sort - things mentioned by Lord Greene MR, at page 682 in *Associated Provincial Picture House v. Wednesbury Corporation*.

[29] At p. 148, Raja Azlan Shah Ag. CJ (Malaya) (as HRH then was) said:

... On principle and authority, the discretionary power to impose such conditions "as they think fit" is not an uncontrolled discretion to impose whatever conditions they like. In exercising their discretion, the planning authorities must, to paraphrase the words of Lord Greene M.R. in *Associated Provincial Picture House v. Wednesbury Corporation* have regard to all relevant considerations and disregard all improper considerations, they must produce a result which does not offend against common sense: or to repeat Lord Denning M.R's words in *Pyx Granite Co Ltd v. Ministry of Housing and Local Government*, approved in *Fawcett Properties Ltd v. Buckingham County Council* the conditions to be valid must fairly and reasonably relate to the permitted development. The *dictum* of Lord Dening M.R. has been frequently quoted and followed in these matters. See *R v. Hillingdon Council, Ex parte Royco Homes Limited*. Lord Denning said (page 572):

> The principles to be applied are not, I think in doubt. Although the planning authorities are given very wide powers to impose 'such conditions as they think fit'. Nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use these powers for an ulterior object, however desirable that object may seem to them to be in the public interest.

...

... Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it

should not be exercised unreasonable. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law. I would once again emphasise what has often been said before, that "public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place", (per Dankwerts LJ in *Bradbury v. London Borough of Enfield*).

Applicant's Case

[30] The applicant contends that the respondent in imposing the Sub-Licence Agreement is:

(i) acting *ultra vires* its powers;

(ii) imposing an agreement that is illegal and/or in contravention of the law; and

(iii) acting unreasonably, grossly disproportionately and is motivated by factors which are irrelevant.

First Ground - Ultra Vires

[31] Firstly, learned counsel for the applicant submitted that the 25% 'take' on the gross revenue of the applicant as some form of site rental/sub-licence fee is not pursuant to any powers conferred upon by the Local Government Act 1976 ('LGA'). The respondent, being a corporation statutorily created can only derive its powers from the LGA and within that operate and administer the relevant bye laws that are passed under the relevant statutes (*Penang Dvpt Corp v. Teoh Eng Huat & Anor* [1992] 1 CLJ 476; [1992] 3 CLJ (Rep) 204; [1992] 1 MLJ 749).

[32] The three applicable acts and bye laws are (i) The Town and Country Planning Act 1976, (ii) Street, Drainage and Building Act 1974 (Uniform Building Bye Laws 1984), and (iii) the Local Government Act 1976 (Advertisement (Sepang Municipal Council) By Laws 2007).

[33] Secondly, it was submitted that the terms of the Sub-Licence Agreement purport to give broad overreaching powers to the respondent not contemplated within its role or powers. For example:

(i) Clause 8 - where the applicant is not entitled to change its shareholding as long as the agreement is in subsistence without the consent of the respondent;

(ii) Clause 4.3 - requires the applicant to provide an undertaking that it will deliver to the respondent its management accounts, audited accounts, profit and loss statements; repeated in cl. 6.1(a) & (b); and

(iii) Clause 6.1(a) - requires the applicant to undertake that it will pay its taxes.

All of which entitle the respondent to terminate the agreement if there is a breach thereof and retake possession of the site.

[34] Learned counsel for the applicant submitted that the imposition of the Sub-Licence Agreement by the respondent on the applicant is *ultra vires* the powers of the respondent because:

(i) It is not provided for under the LGA;

(ii) It is nor provided for under any bye laws;

(iii) It is not a permitted source of revenue (s. 39 LGA);

(iv) Insofar as it purports to be a contract, is not a permitted contract (s. 36 LGA);

(v) And insofar as it purports to be compliance of a directive by the State Authority under s. 9 LGA, as it is inconsistent with the provisions of the LGA, it is firstly not a directive that could have been given as it is inconsistent with the LGA for the reason set out above; and

(vi) It contains clauses empowering the respondent beyond that contemplated in the LGA.

Second Ground - Illegality

[35] Learned counsel for the applicant argued that a recipient of a TOL, unlike a recipient of a lease or tenancy, has no right in the land. Therefore, the TOL holder cannot sub-let the same. Instead, a TOL holder has only a limited right to occupation and

that limited right of occupation is inconsistent with the occupation by another; hence the restriction under s. 68 of the National Land Code ('NLC') (*Paruvathy d/o Murugiah v. Krishnan s/o Doraisamy* [1983] 1 LNS 19; [1983] 2 MLJ 121; *United Overseas Bank (Malaysia) Bhd v. Mok Hue Huan & Anor* [2010] 9 CLJ 764; [2010] 7 MLJ 293; *Ang Too Chew & Sons (Malaysia) Sdn Bhd v. Wakil-wakil Diri Bagi Mohamed Taib Yusoff, Simati* [1997] 2 CLJ 687; [1998] 5 MLJ 481; *Marble Terrazo Industries Sdn Bhd v. Anggaran Enterprise Sdn Bhd & Yang Lain* [1991] 1 CLJ 109; [1991] 1 CLJ (Rep) 691; [1991] 1 MLJ 253; *Murugesan v. Krishnasamy & Anor* [1957] 1 LNS 44; [1958] 1 MLJ 92).

[36] The Recital to the Sub-Licence Agreement including clause 30 sets out exactly the scope of the sub licensing of the TOL. It is without doubt that the right that is being 'licensed' out is the right to occupy the site, such right of which is exclusive to the TOL holder and cannot be assigned. The whole *substratum* of the Sub-Licence Agreement is in express contravention of s. 68 of the NLC rendering the imposition of any rent in consideration for the occupation of the site by someone other than the TOL holder illegal and a nullity.

Third Ground - Unreasonableness

[37] Learned counsel for the applicant argued that the fees which were imposed in 2009 of almost a quarter million was arbitrary and disproportionate when in the past the applicant only paid out in the region of RM30,000 for the licences and approvals.

[38] The respondent also arbitrarily decided at first that it would not include costs of the TOL/licences/approvals under the current bye laws, then decided it would and then finally in the Sub-Licence Agreement appears to have reached a half-way point where the TOL fees appears to be part of the 'rental' over but only if the 25% scheme is accepted as opposed to the fixed fee scheme but the licences/approvals are excluded.

[39] Further, it was submitted that the clauses in the Sub-Licence Agreement are unreasonable and oppressive requiring delivery up of documents which ordinarily only the income tax authorities have a right to. The respondent even conferred upon itself a right to object to the change of shareholders in the applicant. The entire tenor of the Sub-Licence Agreement is that the respondent has absolute rights and discretion to terminate the agreement with the applicant and require the applicant to vacate the site.

[40] Finally, it was argued that the respondent's stance was one of 'sign or else'. The applicant had invested a considerable sum of capital in erecting a billboard on the site after the applicant had obtained the TOL for the site and all the necessary permits and licences. It was within the legitimate expectation of the applicant that it would continue to be able to maintain the billboard and derive income therefrom as long as it obtained the necessary permits and licences. The respondent purportedly through powers vested in it from the circular has summarily and arbitrarily denied the applicant of its right to apply for a renewal of its TOL, directed the Land Authority to issue TOL's only to it, thereby obtaining a monopoly over all the billboard sites on State land, and then enters into what can only be described as a profiteering venture by in turn 'renting' or 'sub-licensing' the TOL to the applicant at least ten times the original fee. The Sub-Licence Agreement that it is forcing on to the applicant is replete with clauses granting the respondent rights not contemplated within the LGA or any other written law which are over reaching and excessive.

[41] The respondent's actions are wholly perverse to the principles of proportionality, justice and reasonableness and grossly *ultra vires* sits powers.

Respondent's Reply

[42] Learned counsel for the respondent argued that since the applicant appears to have accepted the offer letter the applicant is bound to accept the Sub-Licence Agreement. Further, the respondent is able and has the right to contract since it is a body corporate. Therefore, the respondent may enter into contracts necessary for the discharge of its functions (s. 36 LGA). In this respect, the respondent has the power to acquire, purchase or take on lease any land (s. 101(s) LGA); and allows it to collect revenue through taxes, rates, rents, licence fees, dues and other sums or charges (s. 39 LGA). Lastly, it was submitted that the respondent had no alternative to entering into the contract as it is duty-bound to follow and give effect to the circular which were issued by the Selangor State Government. The act of the respondent in making an offer for the tenancy or the sharing of the site is in accordance with the direction of the State Authority in the circular (s. 9 LGA).

Decision

[43] The law on the doctrine of *ultra vires* is quite settled. In *Penang Dvpt Corp v. Teoh Eng Huat & Anor*, *supra*, Edgar Joseph Jr J enunciated the law in relation to *ultra vires*. The following passage bears reproduction:

At pp. 754 - 755:

> I recognise that statutory corporations are subject to the doctrine of *ultra vires*. They are mere creatures of the statutes creating them, and the law will not suppose that they were created by any purpose other than those which induced the legislature to act (see *Harts's Introduction to the Law of Local Government and Administration* (8th Ed) at pp. 292-293).
>
> The doctrine of *ultra vires* as applied to statutory corporations has been well put by Lord Watson in *Baroness Wenlock & Ors v. River Dee Company* thuswise at p. 362:
>
> > Whenever a corporation is created by Act of Parliament, with reference to the purposes of the Act, and solely with a view of carrying these purposes into execution, I am of opinion not only that the objects which the corporation may legitimately pursue must be ascertained from the Act itself, but that the powers which the corporation may lawfully use in furtherance of these objects must either be expressly conferred or derived by reasonable implication from its provisions.
>
> Unlike a natural person who can in general do whatever he pleases so long as what he does is not forbidden by law or contrary to law, a statutory corporation can do only those things which it is authorised to do by statute, directly or by implication. If such a corporation acts otherwise than in this way its acts are *ultra vires*. There must in all cases be statutory authority for what is done, and that authority must either by expressly give nor reasonably inferred from the language of an Act of Parliament.
>
> The doctrine, if strictly applied to statutory corporations, would greatly impede their activities and would require empowering legislation to be burdened to an impossible extent by detailed provisions. The courts have therefore held that a corporation may do not only those things for which there is expressed or implied

authority, but also whatever is reasonably incidental to the doing of those things. As Lord Selbourne said in *Attorney General v. Great Eastern Railway Co* at p. 478:

> It appears to me to be important that the doctrine of *ultra vires* … should be maintained. But I agree … that this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorised ought not (unless expressly prohibited) to be held by judicial construction, to be *ultra vires*.

However, this extension, to include powers fairly incidental to those expressly conferred, does not indirectly enable statutory corporations to evade the doctrine of *ultra vires*. When the question arises whether a power if fairly incidental to those expressly given by the incorporating statute, thought it must be determined reasonably, the courts will not strain the language of the statute to enable the corporation to engage in activities never contemplated by the legislature. Thus if a company is incorporated by statute to manufacture railway vehicles, it cannot engage in the construction of railway systems (see *Ashbury Railway Carriage & Iron Co Ltd v. Riche*).

In *London County Council v. Attorney General*, Lord Halsbury LC referred to *Ashbury Railway Carriage & Iron Co Ltd v. Riche* and *Attorney General v. Great Eastern Railway* and said: 'I think now it cannot be doubted that those two cases do constitute the law upon the subject'.

On the other hand, the tendency of the modern law is to show that the courts are more liberal in their interpretation of what is fairly incidental than was formerly the case (see *A-G v. Crayford Urban District Council* and *Bell Houses Limited v. City Wall Properties Ltd*). Thus it has been held that the setting up of a department to undertake the provision of all the printing and stationery required by a borough council is fairly incidental to the purposes of a municipal corporation, and so not *ultra vires* (see *A-G v. Smethwick Corp*). So also, the employment of a consultant rating surveyor to advise a rating authority on proposals under the Local Government Act 1948 was not *ultra vires* (see *Grainger v. Liverpool Corp*).

And at p. 756:

> It follows that in the application of the doctrine of *ultra vires* there are then three issues: first, whether what is done is specifically authorised by statute; secondly, whether (if there be no specific authority) one can reasonably imply authority from the language

of the statue; and thirdly, whether an act for which no such director implied authority is found is reasonably incidental to the carrying into effect of a statutory purpose (see *CA Cross Principles of Local Government Law* (4th Ed) pp 8-9).

[44] The LGA is an act to consolidate the laws relating to local government. The matters over which a local council has powers and duties a reset out in Parts VII, VIII, IX, X, XI, XII and XV of the LGA. Under Part XIII, the local authority has the power to make bye laws, which is subject to being confirmed by the State Authority and gazetted.

[45] The first question for determination is whether in imposing the Sub-Licence Agreement on the applicant, the respondent was acting *ultra vires* its powers under ss. 13, 36, 101(s), 39, and 9 LGA. The sections in question read as follows:

S. 13 Local authorities to be corporations

Every local authority shall be a body corporate and shall have perpetual succession and a common seal, which may be altered from time to time, and may sue and be sued, acquire, hold and sell property and generally do and perform such acts and things as bodies corporate may by law do and perform.

S. 36 Contracts

(1) A local authority may enter into contracts necessary for the discharge of any of its functions provided that such contracts do not involve any expenditure in that year in excess of sums provided in the approved annual estimates for the discharge of such functions unless such expenditure in that year authorised under section 56.

(2) All contracts made by the local authority or by a Committee thereof on behalf of the local authority shall be made in accordance with the standing orders of the local authority and in the case of contracts for the supply of goods or materials or the execution of works the standing orders shall require that:

(a) except as otherwise provided therein tenders shall be called for in such manner as may in such orders be prescribed; and

(b) no contract enduring for a longer period than the time elapsing between the making of such contract and defendant end of the financial year shall be made without the previous consent of the local authority.

S. 101 Further powers of local authority

(s) to acquire, purchase or take on lease any land, or any other property, right or interest within or without the local authority area which may be necessary for the purposes of this Act;

(ff) to do all things necessary for carrying out all the provisions for and in regard to which the local authority is empowered from time to time to make by-laws, standing orders, rules and regulations, and for carrying out all such by-laws, standing orders, rules and regulations into effect;

S. 39 Revenue of the local authority

The revenue of a local authority shall consist of -

(a) all taxes, rates, rents, licence fees, dues and other sums or charges payable to the local authority by virtue of the provisions of this Act or any other written law;

(b) all charges or profits arising from any trade, service or undertaking carried on by the local authority under the powers vested in it;

(c) all interest on any money invested by the local authority and all income arising from or out of the property of the local authority, movable and immovable; and

(d) all other revenue accruing to the local authority from the Government of the Federation or of any State or from any statutory body, other local authority of from any other sources as grants, contributions, endowments or otherwise.

S. 9 Power of State Authority to issue directions

(1) The State Authority may from time to time give the local authority directions of a general character, and not inconsistent with the provisions of this Act, on the policy to be followed in the exercise of the powers conferred and the duties imposed on the local authority by or under this Act in relation to matters which appear to the State Authority to affect the interests of the local authority area, and the local authority shall as soon as possible give effect to all such directions.

[46] Section 9 LGA empowers the State Authority to give directions to local authorities. It is not in dispute that the circular is in effect a direction under s. 9 LGA. However, it is also expressly provided that the directions given may not be

inconsistent with the provisions of the LGA. Therefore, a directive or any portion thereof shall to the extent of any inconsistency with the LGA, be void and/or no effect.

[47] In this instance, the respondent has justified its imposition of the 25% rental charge under the Sub-Licence Agreement was in compliance with the circular. Upon a perusal of the relevant provisions of the LGA above, there is nothing to support the contention that it is a permitted source of revenue under the LGA; neither is it provided under any bye laws.

[48] The court agrees with the submission of the applicant that the terms of the Sub-Licence Agreement purports to give the respondent broad overreaching powers. The powers, especially those contained in cls. 8 (change of shareholding), 4.3 (undertaking to provide audited accounts) and 6.1(a) (undertaking to pay taxes) are not within the terms of its powers under the LGA or bye laws. Neither can it be said that such powers were within the bounds of the statutory purpose or within the contemplation of its statutory powers.

[49] This point must also be considered with the scope of the Sub-Licence Agreement. Under the Sub-Licence Agreement, the respondent is contracting as the holder of the TOL of the site upon which the billboard is erected. The respondent purports to permit the applicant to enter into and use the 'Billboard Site' (defined in recital 1.1 as the land over which the respondent is in the process of obtaining a TOL or possess the requisite legal rights over it) for the duration of the Sub-Licence Agreement; the applicant is permitted to *inter alia*, construct and equip the billboard sites at the applicant's own expense. In the circumstances, it cannot be denied that what is being licensed by the respondent to the applicant under the Sub-Licence Agreement is the right to occupy the 'Billboard Site'.

[50] At the heart of this issue is the question - what is a TOL? Can it be licensed out by a TOL holder in the manner set out in the Sub-Licence Agreement? It is issued under s. 65 NLC which invests the State Authority with power to licensed temporary occupation of State land. Therefore, a TOL is only a bare licence. It is personal to the holder; it cannot be transferred or assigned to any third party (s. 68 NLC). In fact, it is terminated on the death of the person or dissolution of the body, the holder of the TOL, as the case may be.

[51] In *Paruvathy d/o Murugiah v. Krishnan s/o Doraisamy* [1983] 1 LNS 19; [1983] 2 MLJ 121, the Federal Court has occasion to consider the effect of s. 68 NLC at p. 123:

> It is obvious from this section that a TOL, being a licence only confers a personal right to the licence holder (right *in personem*). This right comes to an end when the holder in the case of a natural person dies or in the case of a company or a firm or other bodies is dissolved. Being a personal right, the legal relationship thereby created is only between the licensor and the licensee. The licence is therefore non-transferrable or incapable of assignment at the option of the licensee. It is not a right *in rem* which its holder can deal with as he or it pleases to the detriment of the issuing authority. Thus any assignment or arrangement purporting to transfer or assign the whole or any part of the licensed land will be of no effect and such assignment or arrangement will be illegal under s. 24 of the Contracts Act (see *Heng Cheng v. Krishnan* [1955] MLJ 103 and *Murugesan v. Krishnasamy & Anor* [1958] MLJ 92).

[52] On the subject of s. 24 of the Contracts Act 1950, it is instructive to adopt the passage in *United Overseas Bank (Malaysia) Bhd v. Mok Hue Huan & Anor* [2010] 9 CLJ 764; [2010] 7 MLJ 293 where Mohd Zawawi J (now JCA) said at p. 774 (CLJ); pp. 303 & 304 (MLJ):

> Where the consideration or object of an agreement is of such a nature that, if permitted, it would defeat any law, such an agreement is unlawful and thus void by virtue of cl (b) of s. 24 of the Act. Sometimes, the nature of the act may be such that it is not directly forbidden by law but, if permitted, it would defeat the provisions of any law. 'Law' means any law for the time being in force in Malaysia. In *Heng Cheng v. Krishnan* [1955] MLJ 103 (HC), the alleged agreement was in fact an attempt to sell and to purchase the defendant's rights under the temporary to sell licence. It contravened r. 41 of the Land Rules which stated - 'No licence for the temporary occupation of State land shall be transferable'. It was, thus, held that the agreement was unlawful under cl. (b) s. 24 as being of such a nature that permitted it would defeat the provisions of any law ...

[53] In all the circumstances aforesaid, the court is satisfied that the right being licensed out by the respondent to the applicant is the right to occupy the Billboard Site - the land over which the licence under the TOL is issued. The Sub-Licence Agreement is in fact an arrangement to circumvent s. 68 NLC which prohibits the assignment or transfer of the TOL to any third party.

[54] In consequence, the respondent had *ultra vires* its powers when it sought to impose the Sub-Licence Agreement on the applicant. Further, for being in express contravention of s. 68 NLC, the purported assigment of the TOL under Sub-licence Agreement is illegal, null and void.

[55] By reason of the aforesaid can it be said that respondent had improperly exercised its discretionary powers. This question can be answered by reference to background facts set out earlier. When previously the fees charges for the billboards were about RM33,000 the new fees sought to be imposed comes close a quarter million. The terms in the Sub-Licence Agreement relating to the control of the applicant's shareholding, delivery of audited accounts and undertaking to pay taxes, are with respect rather arbitrary and not within the scope or contemplation of the respondent's powers under the LGA and bye laws. It is also pertinent to consider the fact that the applicant had been occupying the 'Billboard Site' since 2007 and has invested substantial sums in obtaining the necessary approvals, licences and permits including the construction of the billboard structure. What the respondent sought to do under the Sub-Licence Agreement was an entirely different and distinct scheme altogether; it sought in one breath to disenfranchise the applicant as the TOL holder to its right to apply for a renewal of its TOL; instead, the local authority would be issued the TOL. The respondent would then sub-licence the TOL to the applicant and charge a 25% fee on the gross revenue. This scheme does not appear to be contemplated within the LGA or bye laws. It is also illegal for being in contravention of s. 68 NLC.

[56] For the foregoing reasons, the respondent's application for judicial review must be allowed in prayers (1), (2), (3), (4), (5) as amended, and (6). Costs of RM20,000 to the applicant.